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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 1336

AARON WILLIAMS,

Petitioner,

v.

TEXAS FARM PRODUCTS COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE TWELFTH SUPREME JUDICIAL DISTRICT OF TEXAS, AT TYLER

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No. ———

AARON WILLIAMS,

Petitioner,

v.

TEXAS FARM PRODUCTS COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE TWELFTH SUPREME JUDICIAL DISTRICT OF TEXAS, AT TYLER

Petitioner, Aron Williams, prays that a writ of certiorari issue to review the judgment of the Court of Civil Appeals For The Twelfth Supreme Judicial District of Texas, at Tyler, in this cause (No. 191 on the docket of said court, styled Texas Farm Products Company v. Aron Williams).

OPINION BELOW

The opinion in this cause of the Court of Civil Appeals For The Twelfth Supreme Judicial District of Texas, at Tyler (hereinafter called Court of Civil Appeals) is reported at 406 S.W. 2d 256, and is set forth in the Appendix hereto at pp. 35-47. The mandate (judgment) of the Court of Civil Appeals, and its order overruling Petitioner's Motion For Rehearing are set out at pp. 66-7 of the Appendix hereto. No opinion was rendered by the trial court (145th Judicial District Court of Nacogdoches County, Texas), nor by the Supreme Court of Texas. The orders of the Su-

preme Court of Texas refusing (with the docket notation "Refused. No Reversible Error") to review the judgment of the Court of Civil Appeals and overruling Petitioner's Motion For Rehearing are set out at pp. 67-8 of the Appendix.

JURISDICTION

The judgment of the Court of Civil Appeals was made and entered July 21, 1966, and its order overruling Petitioner's Motion For Rehearing was made and entered September 22, 1966. The order of the Supreme Court of Texas refusing (with docket notation "Refused. No Reversible Error") Petitioner's Application For Writ of Error to review the judgment of the Court of Civil Appeals was made and entered January 4, 1967, and its order overruling Petitioner's Motion For Rehearing was made and entered February 1, 1967.* The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1257(3).

QUESTION PRESENTED

Petitioner (Aron Williams) brought this suit in the Texas courts against his empoyer (Respondent Texas Farm Products Company) under Section 16(b) of the Fair Labor Standards Act of 1938, as amended (hereinafter "FLSA") (52 Stat. 1069, 1938, as amended, 29 U.S.C. Sec. 216(b), 1964) for overtime compensa-

*Under the authority of *Mich.-Wis. Pipe Line Co. v. Calvert*, 347 U.S. 157 at 160 (1954), and cases there cited, the writ of certiorari, as hereby sought, is to the Court of Civil Appeals, rather than to the Supreme Court of Texas, although the time limt for applying to this Court for the writ runs from the action of the Supreme Court of Texas overruling Motion for Rehearing of its order refusing to review the judgment of the Court of Civil Appeals.

tion due him under Section 7 of the FLSA (52 Stat. 1063, 1938, as amended, 29 U.S.C. Sec. 207, 1964). Respondent defended by claiming the exemption from Section 7 of the FLSA provided in Section 13(b)(1) of the FLSA (52 Stat. 1068, 1938, as amended, 29 U.S.C. Sec. 213(b)(1), 1964) for "any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 304 of Title 49 (Section 204 of the Motor Carrier Act of 1935, 49 Stat. 546, 1935, as amended, 49 U.S.C. Sec. 304, 1964)." The trial court entered judgment in Petitioner's favor on the evidence and the jury's verdict, but the Court of Civil Appeals (whose judgment the Supreme Court of Texas declined to review), reversed and rendered judgment for Respondent on the sole ground that it was entitled to the referenced exemption provided for in Section 13(b)(1) of the FLSA. The question presented is:

> Whether an employee otherwise indisputably covered by Section 7 of the FLSA can be held as a matter of law to be within the exemption provided in Section 13(b)(1) of the FLSA solely by reason of the fact that, as a part of his employment, the employee regularly merely rides in a truck doing interstate hauling, for the purpose of being available to unload the truck when it reaches its destination, where it has been found on sufficient evidence that the employee's duties and activities were not such as substantially affect safety of operation of the vehicle and where there is no finding, and it is not established by the evidence, that he engaged in or that his duties included any of the activities of "helpers" (or others) which

the Interstate Commerce Commission has found to affect directly safety of operation of the vehicle on the highway in interstate commerce and where the findings and evidence establish that if any such activities were engaged in the same were so trivial, casual, and insignificant as to be de minimis.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the Fair Labor Standards Act of 1938, as amended, the FLSA, are sections 7, 13(b)(1) and 16(b) thereof, being, respectively, 52 Stat. 1063, 1068, 1069 (1938), as amended, 29 U.S.C. secs. 207, 213(b)(1), 216(b) (1964). Since it is undisputed that Section 7 of the FLSA was correctly applied in Petitioner's favor by the trial court, unless Petitioner comes within the exemption to it provided for in FLSA Section 213(b)(1), the detailed provisions and precise wording of Section 7 are not material to the case, and it is sufficient to note its general thrust expressed in Paragraph (a)(1) of Section 7 as follows:

> "(a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed;" (52 Stat. 1063, 1938, as amended, 29 U.S.C. Sec. 207 (a)(1), 1964).

Section 16(b) of the FLSA (52 Stat. 1069, 1938, as amended, 29 U.S.C. Sec. 216(b), 1964), which provides for suits by employees "in any court of competent

jurisdiction" to enforce their rights in case the employer violates Sec. 207 (or Sec. 206), is set out in relevant part in the Appendix at p. 47 infra.*

The relevant portion of section 13(b)(1) of the FLSA, 52 Stat. 1068, 1938, as amended, 29 U.S.C. Sec. 213(b)(1), 1964, states:

> "(b) The provisions of Section 207 of this title shall not apply with respect to—
>
> (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 304 of Title 49 [Section 204 of the Motor Carrier Act of 1935, 49 Stat. 546, 1935, as amended, 49 U.S.C. Sec. 304, 1964];"

The relevant provisions of the Motor Carrier Act of 1935 are the below quoted portions of Section 204(a) thereof (49 Stat. 546, 1935, as amended, 49 U.S.C. Sec. 204(a), 1964), viz:

> "(a) It shall be the duty of the [Interstate Commerce] Commission—
>
> . . .
>
> "(3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of op-

*Section 16(b), FLSA, also authorizes recovery of liquidated damages and attorney's fees. These were accordingly awarded Petitioner in the trial court, over Respondent's claim that it acted in good faith and hence liquidated damages were improper under Sec. 11 of the Portal-to-Portal Act of 1947 (61 Stat. 89, 1947, 29 U.S.C. Sec. 260, 1964), which is quoted in the Appendix at pp. 47-8 infra. The Court of Civil Appeals did not pass on this point, in view of its holding that Petitioner was exempted from the FLSA by its Sec. 13(b)(1).

eration, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment . . .'"*

Involved, at least collaterally, is the 1941 order of the Interstate Commerce Commission (giving its views with respect to its jurisdiction to establish qualifications and maximum hours of service of interstate motor carrier employees under the above quoted portions of Section 204(a) of the Motor Carrier Act of 1935) in the proceeding styled *Ex parte No. MC-2, In the Matter of Maximum Hours of Service of Motor Carrier Employees.* 28 MCC 125 (1941). The relevant portions of this order are set forth in the Appendix at pp. 48-62 infra.**

STATEMENT OF THE CASE

Petitioner Aron Williams instituted this suit against his employer (Respondent Texas Farm Products Company) in the Texas courts under the authority of Section 16(b) of the FLSA for overtime compensation due him under Section 7 of the FLSA, together with liquidated damages and attorney's fees as provided for in Section 16(b), and his trial pleading reflects that

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*Paragraphs (1) and (2) of Section 204(a) of the Motor Carrier Act of 1935, as amended, make similar provisions with respect to "common carriers" and "contract carriers," but quotation of such provisions is omitted because it is undisputed that, insofar as Petitioner's relevant employment for Respondent is concerned, Respondent was a private carrier of property by motor vehicle to the extent it was an interstate carrier of any kind; and, in any event, there is no difference which is here material as between paragraphs (1), (2) and (3) of section 204(a).

**Material to an understanding of the procedural posture of the case are the following Texas Rules of Civil Procedure, Rules 279, 428, 481, 483 and 515, the relevant protions of which are quoted in the Appendix at pp. 62-65 infra.

his claims under this federal statute (the FLSA) formed the entire basis of his suit.* Respondent, as indicated by its pleadings (Tr. 5, 7), defended by asserting the exemption from FLSA Section 7 provided for in FLSA Section 13(b)(1), claiming that Petitioner was an employee as to whom the Interstate Commerce Commission had power to establish qualifications and maximum hours of service pursuant to Section 204(a) of the Motor Carrier Act of 1935. Following trial to a jury, the trial court rendered judgment "on the pleadings in this cause, the evidence and the verdict of the jury" in Petitioner's favor for overtime compensation under Section 7 of the FLSA and attorney's fees and liquidated damages under Section 16(b).**

On appeal Respondent presented *only* two contentions ("Points of Error"), first that "the trial court erred in ruling that Appellee [Petitioner] was not exempt under Section 13(b)(1) FLSA from the overtime pay requirements of Section 7 FLSA," and second that the trial court erred in awarding liquidated damages because it was conclusively shown that the employer acted in good faith (Respondent's "Appellant's Brief" in the Court of Civil Appeals, p. 2). The Court of Civil Appeals sustained the first contention,

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*See pp. 1, 35 of the "Transcript" (hereafter "Tr.") filed, under this Honorable Court's Rule 21(1), as a part of the complete record below and duly certified. Other parts of the record so filed and certified include the "Statement of Facts" (hereafter "SF.") the "Supplemental Transcript (hereafter "Sup. Tr."), all the briefs, motions and other papers filed with the Court of Civil Appeals and Supreme Court of Texas, and the orders of those courts.

**The trial court's judgment, which recites the jury's verdict, appears at Tr. pp. 14 et. seq.

reversed the judgment in Petitioner's favor and *itself rendered* judgment for Respondent, its holding being expressed in the last two sentences of its opinion, viz:

> "The appellee [Petitioner] therefore, under the record in this case, falls clearly within the provisions of Section 213(b)(1) of the Fair Labor Standards Act, and appellant [Respondent] was not obligated to pay the overtime sums for which suit was brought. The trial court erred in so holding and the judgment of the court below is reversed and is here rendered for the appellant."

This is the sole ground of the judgment of the Court of Civil Appeals, and because of it the Court did not reach the question of Respondent's defense of claimed good faith to the award to Petitioner of liquidated damages. No grounds of state law (substantive or procedural) were assigned by the Court of Civil Appeals in support of its judgment, nor were any urged by Respondent.* Accordingly, it is plain that the federal question sought to be reviewed is the only question in

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*Petitioner timely and properly preserved his contentions by his "Appellee's Motion For Rehearing" filed with the Court of Civil Appeals and his "Application For Writ of Error," and "Motion For Rehearing of Application For Writ of Error" in the Supreme Court of Texas, which are all included in the record filed with this Honorable Court and presented (see pp. 1, 4 and 1 of these documents respectively) the contention that "The Court of Civil Appeals erred in holding that Petitioner, Aron Williams, was exempt under Section 13(b)(1) of the FLSA and thus not entitled to overtime compensation pursuant to Sec. 7 of the FLSA." (Application, p. 4). The Supreme Court of Texas refused the "Application for Writ of Error" with the docket notation "Refused. No Reversible Error," which means it was "of the opinion that the application presents no error which requires reversal," Rule 483, Texas Rules of Civil Procedure; it overruled Petitioner's motion for rehearing of application for writ of error without any opinion or entry other than "overruled."

the case, that it was adequately presented and preserved, and that the decision below was on this ground and no other.

It was stipulated at trial that at all times material Respondent produced goods for, and was engaged in, "commerce" with the meaning of the FLSA, and manufactured or "jobbed" feed, fertilizer and associated products shipped in interstate commerce (SF 9, 10).

Petitioner worked for Respondent from July or August 1963 until June 24, 1964 at its place of business in Nacogdoches, Texas (SF 12, 61, 70, 71).* He performed certain miscellaneous work in Respondent's plant there about one day per week (SF 82, 83, 86, 90, 206). The balance of Petitioner's work, which is the part in issue, involved riding with the driver in Respondent's trucks (which frequently and regularly, but by no means exclusively, were on interstate trips) and when the driver stopped at a particular delivery point to help the driver *un*load the merchandise (SF 13, 39, 73, 74, 76, 77, 98, 203). This was necessary because of the great number of stops the truck usually made on each trip (SF 76, 77), and, presumably, because of the largness of Respondent's trucks (SF 13, 37, 38, 100, 109). The job title given this work by Respondent (and Petitioner) was "driver's helper or swamper" (SF 13, 39, 98). Petitioner testified he was told by Respondent that these were his duties (riding with the driver

*That Respondent did not pay Petitioner the overtime to which Petitioner was entitled under FSLA Section 7 (unless taken out of Section 7 by Section 13(b)(1)) is not in dispute, nor is the amount of deficiency in this regard, nor the amount of attorney's fees, nor the amount of (as distinguished from the entitlement to) liquidated damages. Consequently, the evidence in this regard will not be summarized.

to *un*load at destination), and was never told he had any other duties in connection with his riding on the trucks, neither loading, nor fixing flats, nor putting chains on or changing tires or otherwise assisting with (or doing mechanical work on) the truck, nor helping drive, nor flagging traffic or putting out flares or going for help in case of breakdown, nor directing crossing at railroad tracks, nor anything else (SF 74-79). He stated he never did, and it was not a part of his duties to, caution the driver about approaching vehicles or wipe off the windshield or headlights (SF 136), and he never helped change tires or did any work on the truck or put out flares and never did anything to assist the driver out on the highway (SF 77, 154). Respondent's witness Rhoades testified Petitioner was on the trucks for the purpose of helping unload (SF 203).

It is not disputed that the unloading was done off the highway, at the private docks (SF 129, 134, 195-203).

With respect to loading, it is undisputed that Petitioner did none whatsoever before the trucks left for their destination, as Respondent had a regular loading crew that took care of this (SF 76, 130). This was not, he testified, any part of his duties (SF 74).

While working in the plant (as opposed to his duties as a "swamper," riding in the truck to unload at destination) Petitioner did on occasion place items (feed) on the plant conveyor belt which went up into the truck, but *other* employees (to the exclusion of Petitioner) took this feed off the conveyor belt and actually placed it in the truck (SF 130).

Petitioner's duties riding in the trucks as a "swamp-

er" (for purposes of unloading) did not include "shifting the load or adjusting the load" in any way (SF 76).

Out of all the trips Petitioner rode on during his some 11 or 12 months with Respondent, on only *five* were any items picked up after leaving the plant ("returned" goods, taken back to the plant) (SF 23, 24). Of these five occasions, only two involved a trip across state lines, and on *both* these occasions the loading (of these "returned" goods) was done by someone else, and not by Petitioner (SF 79, 81, 101; also SF 23, 24). The other occasions were all intrastate. As to one of these, there was no testimony as to whether Petitioner did anything. The other two involved molasses; Respondent's trucks were equipped with barrels (into which the molasses was poured) permanently attached to them, and all Petitioner did was the purely mechanical function of locking up the straps to the barrels, this being done under the direction of the driver who had the responsibility for seeing that the straps were attached, and, since the barrels were fixed, no placement of them was involved, and Petitioner did not "adjust the load in any way" (SF 79-81, 137, 203, 204). On none of those rare occasions when Petitioner assisted in loading "returned" goods at a destination point was interstate transportation involved, and in all of them it was the driver, and not Petitioner, who determined just how and where in the truck the items would be placed, and these invariably involved situations in which the truck was "light loaded" (SF 134, 204, 205). As indicated, Petitioner's duties were explained to him by Respondent as being unloading, and loading or helping load was never said to be a part of his job (SF 74).

While Petitioner admitted that on a few rare occasions he did help the driver (by watching) while he was backing up to a loading dock, this was strictly a "casual thing," and he was never told that helping the driver in any such connection was a part of his duties or that he had to be there then, and the driver never asked him to help (SF 100, 101, 121, 122, 152, 153, 156). This backing was simply preparatory to, and a part of, the unloading process, and it was done at the private docks or ramps of destination points (SF 153, 154, 195-203). Petitioner could remember only one, or at the most two, instances where he gave this assistance (SF 158). It was undisputed that *all* this occurred on private property and completely *off* the highway, and none of it involved getting onto or off of the highway (SF 129, 154, 195-203).

Further reflecting the duties of one occupying Petitioner's job classification with Respondent of "swamper or driver's helper" (as the parties called it), is the testimony (SF 159-161) of the witness Moorman (which is in the record by bill of exception, having been excluded from the jury) who also had this position with Respondent. Moorman had nothing to do with driving, and he never assisted in (or did) any of the following: "backing up a truck"; "loading a truck"; "changing tires or working on the truck"; "putting flags out to warn traffic"; telling the driver "to watch out for oncoming traffic, anything of that nature." Further, no one ever told him that any of the foregoing comprised any part of his duties.

The case was submitted to the jury on special issues, and in response thereto the jury found (Tr. 13 et seq.) that: Petitioner regularly or repeatdely, as distin-

guished from on isolated occasions, in the course of his employment rode across state lines in trucks owned by Respondent which were hauling its property (Special Issue, hereafter S1, 1 and 2); Petitioner regularly or repeatedly, as distinguished from on isolated occasions, and during all weeks, in the course of his employment placed Respondent's goods on a conveyor belt which carried them into Respondent's trucks for interstate transportation (S1, 3, 4, 5); Respondent repeatedly transports property interstate (S1 6); Petitioner in his employment was required to cross state lines on a regular, recurring basis (S1 7).* These issues were designed to present the question of interstate commerce, to establish the basic FLSA coverage. Respondent's defense of the exemption provided by FLSA Section 13(b)(1) was presented by special issues 8 and 9, which, with the jury's answers, were as follows:

Special Issue No. 8

"Do you find from a preponderance of the evidence that the plaintiff, Aron Williams, in connection with his employment by defendant, Texas Farm Products Company, engaged in any of the following activities (Answer "Yes" or "No" beside each paragraph listed below alphabetically)?

	[Answers]
a. Directing driver backing into loading docks	Yes
b. Directing driver pulling away from loading docks	No
c. Directing driver onto highways	No

*The jury also, in its answers to Special Issues 10, 11 and 12, rejected Respondent's claim it was in good faith in not paying overtime, and found $750.00 as attorney's fees. The amount due for overtime was not disputed.

d.	Directing driver at railroad intersections	No
e.	Changing tires	No
f.	Setting up flares	No
g.	Fixing Flats	No
h.	Loading trucks	Yes."

"If you have answered any of special issue 8 paragraph A through H, "Yes" then and only in that event answer the following: Special Issue No. 9:

Do you find from a preponderance of the evidence that the activity or activities substantially affected the safety of the operation of the vehicle?

Answer "Yes" or "No." Answer *"No."*

Petitioner in his timely objections to the charge pointed out that this (especially special issue No. 8) was a deficient submission of the claimed Section 13 (b)(1) exemption in that it omitted (among other things) the issues of whether the several activities inquired about formed so trivial, casual, occasional or insubstantial a part of Petitioner's activities as to be de minimis in respect to his employment or its effect on safety of interstate highway vehicle operation, of whether the "loading" was of a kind involving discretion as to the manner or placement of the load or was not "light load" or was otherwise of such nature as to be within the exemption, of whether the several activities had any relation to or were performed in connection with interstate transportation, and of whether the several activities, such as the backing, were performed in connection with travel on the highways (as opposed to being entirely on private property, unconnected

with traveling on, or getting onto or off of, the highway).*

The trial court rendered judgment in all things for Petitioner.

It appears that the above indicated "omitted" factual inquiries were considered as included within the broad inquiry made in Special Issue No. 9 respecting whether the activities "substantially affected the safety of the operation of the vehicle" (which the jury answered in the negative). If this is so, then the indicated "omitted" inquiries were resolved in Petitioner's favor by such express fact finding of the jury. If, however, such "omitted" inquiries were not included within the broad scope of Special Issue No. 9, then they were not included in the charge at all, and, since the trial court rendered judgment (on the entire jury verdict and the evidence) in all things in favor of Petitioner (Respondent having made no objection to the charge, Supp. Tr. p. 5(24)), it therefore follows that these "omitted" factual inquiries must be conclusively deemed to have been found as matters of fact by the trial court in Petitioner's favor. Rule 279, Texas Rules of Civil Procedure;* *Wichita Falls & Oklahoma Rail-*

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*The lengthy objections by Petitioner appear in the Supplemental Transcript (at pp. 5(4-20) thereof) which was filed on the Supreme Court of Texas pursuant to the order of the trial court and the Clerk's certificate (appearing at Supp. Tr. pp. 3, 4, 6) and as authorized by Rules 428 and 481, Texas Rules of Civil Procedure, the relevant portions of which are set out in the Appendix at p. 64 infra. Respondent made no objections to the charge (Supp. Tr. p. 5(24)).

*Rule 279 (App. pp. 62, 63) provides that where a ground of defense is incompletely submitted (and, as here, the losing party in the trial court has not objected to the incomplete submission) the trial court may make express written findings as to the omitted matter, "but if no such written fact

way Co. v. Pepper, 134 Tex. 360, 135 S.W.2d 79 (1940); *McCue v. Collins,* 208 S.W.2d 652 at 655 (Tex. Civ. App. 1948; no writ history).

Further, it is recognized that as to its defense of the claimed Section 13(b)(1) exemption Respondent had the burden of proof. *Idaho Metal Works v. Wirtz,* 383 U.S. 190 at 209 (1966) (". . . . the burden of proof respecting [FLSA] exemptions is upon the [employing] company . . ."); *Walling v. General Industries Co.,* 330 U.S. 545 at 547, 548 (1947); *Yellow Transit Freight Lines Inc. v. Balven,* 320 F.2d 495 at 497 (8th Cir. 1963); *Pugh v. Lindsay,* 206 F.2d 43 at 46 (4th Cir. 1953); *Acme Tire and Battery Company v. Wirtz,* 330 F.2d 116 at 118 (5th Cir. 1964); *Mitchell v. Kroger Company,* 248 F.2d 935 at 941 (8th Cir. 1957). Since Respondent had the burden of proof on its defense, Respondent was obligated to procure fact findings establishing the same. Rule 279, Texas Rules of Civil Procedure; *Texas Employers' Insurance Association v. Wright,* 4 S.W.2d 31 (Tex. Com. App. 1931).

As indicated, the Court of Civil Appeals, holding Petitioner was a *"helper"* within the meaning of the referenced order of the Interstate Commerce Commission, Ex parte No. MC-2, 28 MCC 125 at 135, 136, 139 (1941), found Respondent's Section 13(b)(1) defense was thus established, and accordingly reversed the trial court's judgment for Petitioner and itself *rendered* judgment for Respondent. Of course, the Court of Civil Appeals had no power (and did not purport) to itself make findings on disputed evidence or on evi-

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findings are made [none were here], such omitted issue or issues *shall be deemed* as found by the [trial] court in such manner as to support the judgment." (emphasis added).

dence capable of sustaining different inferences or interpretations; and hence its *rendition* of judgment for Respondent can only be sustained if the same is consistent not only with the express findings of the jury but also with implied findings in Petitioner's favor on *all* other relevant points (except *only* to the extent, if any, the evidence may *conclusively* establish any of such matters in Respondent's favor).*

Accordingly, the facts material to consideration of the question presented are these:

Petitioner, who was during all workweeks in issue engaged in commerce or the production of goods for commerce within the meaning of Section 7 FLSA, had the job of riding in Respondent's trucks carrying its products for the sole purpose of helping the driver unload them after they had reached their destination. Petitioner had no other duties in this connection. His duties and activities did not affect safety of operation of the vehicle in interstate transportation on the highway.

However, on a few occasions he helped direct the driver backing the truck up to loading docks and assisted in regard to loading "return" goods. As to the backing particularly, it all took place on private property *off* the highway, and did not involve getting onto

*See *Lone Star Gas Co. v. Texas,* 304 U.S. 224 at 231 (1932); *Post v. State,* 106 Tex. 500, 501, 171 S.W. 707, 708 (1914); *Stevens v. Masterson,* 90 Tex. 417, 424, 39 S.W. 292, 295 (1897); *Choate v. Railway Co.,* 91 Tex. 406, 410, 44 S.W. 69, 70 (1898); *C. H. Leavell & Co. v. Vilbig Bros., Inc.* 160 Tex. 300, 335 S.W. 2d 211, 213 (1960); *Wisdom v. Smith,* 146 Tex. 420, 209 S.W. 2d 164, 166 (1948); *The Leader v. Elder Mfg. Co.,* 39 S.W. 2d 880 (Tex. Com. App. 1931); *Wilbanks v. Wilbanks,* 160 Tex. 317, 330 S.W. 2d 607, 610 (1960).

or off of the highway. As to the loading particularly, the only instances shown involved intrastate trips; and, in any event, it was of the nondiscretionary character as to placement and manner of load and otherwise, and involved "light load" only.* Such instances (both loading and backing together) were of such character and frequency as to be "de minimis," to form a trivial, casual, occasional and insubstantial part of Petitioner's activities and to have, at most, an indirect, incidental, and insubstantial effect or potential effect on safety of operation of the vehicle in interstate transportation on the highway.

Petitioner did not, nor was it a part of his duties to, do (or assist in) any of the following: flagging, directing or otherwise assisting in, or performing similar duties in connection with, crossing railroad tracks or turning around on (or off of or onto) the highway or entering or emerging from a driveway; placing flares, flags or fuses, or flagging traffic, or going for help in case of a breakdown or an accident; fixing flats, changing or putting chains on tires; wiping off windshield or headlights; any work on the truck itself; cautioning driver about approaching vehicles; anything to assist the driver out on the highway; any loading (except as above indicated) or any "shifting the load or adjusting the load." Of course, Petitioner did no driving.

Respondent's large trucks in which Petitioner rode regularly and frequently made interstate, and also intrastate, trips. Petitioner's job bore the title "swamper or driver's helper."

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*Petitioner's "loading" while he was working in the plant (as opposed to his "swamper's" duties) consisted merely of placing items on a conveyor belt, the items being taken off the belt and actually placed on the truck by others.

The sole question is: do these facts establish as a matter of law that Petitioner is exempted from Section 7 FLSA under Section 13(b)(1) thereof.

REASONS FOR GRANTING THE WRIT

The Court of Civil Appeals has decided an important and substantial question of federal law, namely the proper interpretation of Section 13(b)(1) of the Fair Labor Standards Act, more particularly as applied to an employee who in essence does nothing more than merely ride on trucks doing interstate hauling for the purpose of assisting in their unloading after destination is reached. Its holding is, essentially, that such an employee is covered because *any* employee whose job involves regularly riding with the truck driver on interstate trips is, as matter of law, a "driver's helper" as defined by the Interstate Commerce Commission in *Ex parte No. MC-2, supra,* 28 MCC 125 at 135, 136 139 (1941), and is hence, as a matter of law, within Section 13(b)(1) FLSA and Section 204 (a) of the Motor Carrier Act of 1935, *regardless* of the facts that the employee neither does nor has the duty to do any of the activities which the Interstate Commerce Commission found, in regard to "drivers' helpers," substantially or directly affect safety of operation of the vehicle on the highway and that the employee's duties and activities do not in fact have any substantial or direct effect on safety of operation of the vehicle on the highways. The Court of Civil Appeals also, in effect if not expressly, rejected the "de minimis" rule in determining whether an employee's activities bring him within Section 13(b)(1) FLSA, or at least held that such rule did not operate with respect to alleged "driver's helpers."

The precise substantial question of federal law here presented has not heretofore been determined by this Honorable Court, but it is submitted that the decision of the Court of Civil Appeals on this point is contrary to the relevant principles of law determined by this Honorable Court in *Pyramid Motor Corp. v. Ispass,* 330 U.S. 695 (1947).

Further, and in addition to involving major Federal statutes affecting significant rights of numerous employees and employers throughout the nation, the question here presented is important and substantial because it has not been previously decided in this fashion, because the order of the Interstate Commerce Commission in *Ex parte No. MC-2, supra,* does not expressly resolve the specific question presented, although it strongly points to a result contrary to that reached by the Court of Civil Appeals, because the holding of the Court of Civil Appeals is contrary to the official interpretations of the Administrator of the Wage and Hour Division as to the scope and applicability of the Section 13(b)(1) exemption (29 CFR part 782) and because the holding of the Court of Civil Appeals is contrary to the principles of law announced in many decisions of the Courts of Appeals (e.g. Wirtz v. C. & P. Shoe Corporation, 336 F.2d 21, 5th Cir. 1964; Yellow Transit Freight Lines v. Balven, 320 F.2d 495, 8th Cir. 1963).

Not since its 1947 decisions in *Pyramid Motor Corp. v. Ispass, supra, Levinson v. Spector Motor Co.,* 330 U.S. 649 (1947) and *Morris v. McComb,* 332 U.S. 422 (1947) has this Honorable Court concerned itself with the Section 13(b)(1) FLSA exemption, and yet the principles announced in those decisions have not pro-

vided the needed definiteive answers to important questions, such as that here presented, which have since arisen.

Surely, employees and employers throughout the nation are entitled to know whether the Administrator of the Wage and Hour Division is correct in his official interpretation approving the holding that the Section 13(b)(1) exemption is:

> "... inapplicable to so-called helpers who ride on motor vehicles but do not engage in any of the activities of 'helpers' which the Commission has found to affect directly the safety of operation of such vehicles in interstate or foreign commerce." (29 CFR §782.4, p. 473),

or whether the contrary decision of the Court of Civil Appeals in the instant case represents the law.

A brief review of the authorities will, Petitioner submits, reveal the importance of the question and the error of the Court below.

In its early decision in *United States v. American Trucking Assns., Inc.*, 310 U.S. 534 (1940) this Honorable Court held that the Interstate Commerce Commission's jurisdiction under Section 204(a) of the Motor Carrier Act of 1935 was entirely "limited to those employees whose activities affect the safety of operation" as opposed to all employees of motor carriers subject to the Commission's jurisdiction. Thereafter in 1941, the Commission, in *Ex parte No. MC-2, supra,* undertook to more particularly define its jurisdiction in this respect, and especially to define "affect the safety of operation." The Commission's general conclusions were in relevant part as follows:

> "... [the] clear intent of Congress [is] that we

should regulate the safety of operation of motor vehicles on the *highways* of the country, and *that alone.*" (28 MCC 125 at 129; emphasis added)

. . .

". . . we should not assert jurisdiction as to employees who spend an *insubstantial* part of their time in performing duties which affect the safety of operation of motor vehicles. We therefore conclude that under said Section 204(a) [Motor Carrier Act, 1935] we have power to establish qualifications and maximum hours of service with respect *only* to employees who devote a *substantial* part of their time to activities which *directly* affect safety of operation." (28 MCC 125 at 131; emphasis added)

. . .

". . . our jurisdiction to prescribe qualifications and maximum hours of service . . . is *limited* to those employees who devote a *substantial* part of their time to activities which *directly* affect the safety of operation of motor vehicles in . . . transportation . . . *interstate* or foreign *commerce.*" (28 MCC 125 at 139; emphasis added).

The most significant aspect of these conclusions can be summarized as follows. Not all employees (of motor carriers subject to the Commission's jurisdiction) whose activities affect safety of motor vehicle operation in interstate transportation on the highways are subject to the Commission's jurisdiction in this regard, but rather *only* those whose duties or activities have a direct or substantial affect on such safety of operation. Thus, in *Ex parte No. MC-2, supra,* the Commission, pointing out that "a motor vehicle must be properly loaded to be safely operated on the highways," concluded that it had jurisdiction over "loaders" (28 MCC

125 at 134). But, this Honorable Court, in *Pyramid Motor Corp. v. Ispass, supra,* recognizing that the Commission was speaking in this regard against the background of its general conclusions regarding the necessity of a direct and substantial relation to safety of operation, pointed out that *not all loaders*—and *not all loading*—of motor vehicles for interstate highway trips are covered, stating:

> "... even the placing of certain articles of freight on a motor carrier truck may form so trivial, casual or occasional a part of an employee's activities, *or* his activities may relate only to such articles or to such limited handling of them, that his activities will not come within the kind of 'loading' which is described by the Commission and which, in its opinion, affects safety of operation." (Id., 330 U.S. 695 at 708; emphasis added).

Moreover, this Honorable Court in *Ispass, supra,* made plain that what controlled was not the name given to the employee's position *or* to the activities he performed, but rather the actual nature of the activities themselves, which was to be determined by the judicial process. Thus, this Court in *Ispass* stated:

> "... the District Court shall not be concluded by the name which may have been given to his [the employee's] position *or* to the work that he does ..." (Id., 330 U.S. 695 at 707; emphasis added)
>
> ...
>
> "... If none of the alleged 'loading' activities of the respective respondents, during the periods at issue, come within the *kind of activities which,* according to the Commission, *affect the safety of operation* of motor vehicles within the meaning of the Motor Carrier Act, then those respondents

of which that is true are entitled to the benefits of §7 of the Fair Labor Standards Act." (Id., 330 U.S. 695 at 708; emphasis added).

The foregoing principles announced in the *Ispass* case have frequently been applied by the courts to exclude from the Section 13(b)(1) exemption employees whose jobs or activities, though bearing titles similar to those which the Commission concluded it had jurisdiction over in *Ex parte No. MC-2, supra,* either did not in fact include the particular duties on which the Commission based its conclusion that the job bore the required relation to safety of operation or included such particular duties (or some of them) only to such a trivial, casual and occasional extent as to be "de minimis," incidental and insubstantial as regards affect on safety of operation. See, e.g. *Wirtz v. C & P Shoe Corporation,* 336 F.2d 21 at 29, 30 (5th Cir. 1964) (involving employees doing occasional "driving or helping on defendant's trucks" and "loading"); *Yellow Transit Freight Lines v. Balven,* 320 F.2d 495 (8th Cir. 1963) (involving "loaders").* Moreover, these cases (and many more like them could be cited) make clear that, as this Court held in *Ispass, supra,* the determination of this question is to be made as a matter of fact, so that the decision of the trial court, and/or jury, is binding if there is any evidence to support it. Thus, in *Balven, supra,* the Court said with respect to this question:

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*The Administrator's conclusions are in accord. He states in his official interpretations (29 CFR §782.2, p. 469);

". . . where the continuing duties of the employee's job have no substantial direct effect on such safety of operation or where such safety-affecting activities are so trivial, casual, and insignificant as to be de minimis, the exemption will not apply . . ."

". . . the District Court . . . must be affirmed unless its finding is clearly erroneous or without support in the testimony.

Viewing the evidence in the light most favorable to sustaining the trial court's findings . . . we conclude that the District Court's findings are supported by substantial testimony in the record and accordingly affirm . . ." (Yellow Freight Lines, Inc. v. Balven, 320 F.2d 495 at 499, 8th Cir. 1963).

The decisions of this Honorable Court in *Levinson v. Spector Motor Co., supra,* rendered the same day as *Ispass, supra,* and in *Morris v. McComb, supra,* rendered later in the same year, are not to the contrary. Neither case purported to in any way modify or limit any of the language of the *Ispass* opinion. *Morris* and *Levinson* merely emphasize that the "substantiality" test is not to be determined by any mere mathematical formula as to the percentage of the employee's time devoted to the crucial activities, for his employment may directly and substantially affect safety of operation even though his safety affecting work may occupy but little of his time. As was stated in *Levinson, supra:*

"From a safety standpoint, a partial-duty driver who drives 30 hours continuously and then drives no more during that week creates a greater hazard than the man who drives 10 hours daily for 6 days a week. . . .

. . . So here it is *enough* for the purposes of this case *that a substantial* part of the petitioner's activities consisted of the doing or immediate direction of *the very kind of activities of a loader* that are described by the Commission as *directly affecting safety of operation.* The petitioner's activities thus affected safety of operation, although

it does not appear what fraction of his time was spent in activities affecting safety of operation." (Id., 330 U.S. 649 at 680, 681; emphasis added).

Morris v. McComb, supra, was 5-4 decision in which Justices Black, Douglas, Murphy and Rutledge dissented. The majority in *Morris* relied almost exclusively on *Levinson* to support the result they reached. *Morris* was an *injunction* suit which involved a group of employees whose full time jobs were that of drivers and mechanics, doing all the usual duties of those callings, the activities of all the employees unquestionably having a direct and substantial effect on safety of operation of the vehicle. The case presented was a close one *only* because of the limited amount of *interstate* hauling engaged in by the employer's trucks. The year in question was 1941, and there were 43 drivers and 50 trucks used by the employer, and:

"Each driver appears to have been a full-time driver during each week . . . [there were] a total of 724 [trips] made in interstate commerce . . . These constituted 3.65% of the petitioner's total trips. They were not distributed equally to each driver nor on the basis of 4% of his time each day. However, apparently in the normal operation of the business, these strictly interstate commerce trips were distributed generally throughout the year and their performance was *shared indiscriminately by the drivers* and was mingled with the performance of other like driving services rendered by them otherwise than in interstate commerce. *These trips were thus a natural, integral and apparently inseparable part of the* common carrier *service of the* petitioner and of his *drivers.*" (Id., 332 U.S. 422 at 433; emphasis added).

Plainly, then, neither *Levinson* nor *Morris* deal with

a case, such as the instant one, to which the hereinabove quoted language from *Ispass* is directed. In the first place, neither *Levinson* nor *Morris* touch the situation where the employee, though within a general job classification (such as "loader," "helper," "mechanic" or the like) which the Commission has found to be under its jurisdiction, does not do "the very kind of activities" of that job classification which activities the Commission says are the ones directly and substantially affecting safety of operations. Secondly, neither *Levinson* nor *Morris* deal with the situation in which the employee's performance of the crucial activities *not only* occupies but a small fraction of his time on the job, but *also* is so trivial, casual or occasional as to not really be a part of his job at all, or to be "de minimis" in this regard, as contrasted with being "a natural, integral and apparently inseparable part" of his duties or activities.

It is against this general background that the question of "helpers" must be considered, the Court of Civil Appeals having held that, as matter of law, Petitioner occupied such position and was, as a matter of law, hence within the Section 13(b)(1) exemption. The Commission in *Ex parte No. MC-2, supra,* describes the safety affecting activities of "helpers" as follows:

> ". . . In certain sections of the country, however, carriers employ men known as helpers who ride on the vehicle, but do not drive. *These helpers not only assist in loading and unloading the vehicle but perform many duties which aid in the safe operation of the motor vehicle.** The helpers dis-

*Note that the Commission here says "many duties" rather than "many *other* duties"; in other words it is not the load-

mount when the vehicle approaches a railroad crossing and flag the driver across the railroad tracks. They perform a similar duty when the motor vehicle is being turned around on a busy highway or when it is entering or emerging from a driveway. In the case of a break-down the helper places the flags, flares, and fusees as required by our safety regulations. The presence of a helper in the case of a break-down or an accident makes it possible for one man to go for assistance without leaving the truck unprotected on the highway. Tire trouble is not as frequent as formerly, but punctures do occur. The helper is, of course, of great assistance to the driver in changing tires, putting on or removing chains, and making minor repairs. . . . It is clear, however, that *the duties performed by a helper aid* materially in the *safe operation* of a motor vehicle, and that *they devote substantially all of their time to such work*. . . . We conclude that helpers devote *a substantial part* of their time to *activities which directly affect the safety of operation* of motor vehicles operated in interstate or foreign commerce, and *hence* that we have power to establish qualifications and maximum hours of service for such employees under said section 204(a)."

. . .

"We believe that it is neither necessary nor practicable to draw fine distinctions between the work done by the various employees who ride on the motor vehicle in other capacities than that of driver. To some extent at least they *all engage in activities which directly affect safety of operation.* An attempt to limit our jurisdiction over them in accordance with the degree in which they engage

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ing or unloading which the Commission relies on as a safety affecting part of a "helpers" job such as to give it jurisdiction, but rather it is the additional "many duties."

in such activities would create confusion and continual controversy. They will be included in the category of helpers." (28 MCC 125 at 135, 136; emphasis added).

It is plain from the above that in talking about "helpers" the Commission is referring to employees who perform activities *in addition* to riding, loading and unloading, which additional activities "directly affect safety of operation." It is true, as indicated by the last paragraph in the above quotation, that the Commission asserts jurisdiction over helpers without regard to fine distinctions between the various precise different types or frequencies of safety affecting work which these "helpers" do *in addition* to riding in, loading and unloading the vehicle. But, the point is that the Commission was plainly saying that to come within its definition of a "heper" it was necessary that the employee do, *in addition to* mere riding, loading and unloading, *some* further activity or activities which further activity or activities directly affect safety of operation on the highway. This construction is supported by the Administrator's official interpretation above quoted.* And, any other construction would be inconsistent with the Commission's above discussed express disclaimer of jurisdiction over employees whose duties or activities do not directly and substantially affect safety of operation of the vehicle on the highway. The evidence, judgment and findings below, when viewed most favorably to Petitioner, as they must

*29 CFR § 782.4, p. 473 approves the holding that the Section 13(b)(1) exemption is "inapplicable to so-called helpers who ride on motor vehicles but do not engage in any of the activities of 'helpers' which the Commission has found to affect directly the safety of operation of such vehicles in interstate or froeign commerce."

be in this state of the record, plainly show that Petitioner *never* engaged in *any* of the activities of "helpers" which the Commission described as safety affecting, nor in any similar or analogous activities, *nor* were any of such activities a part of his job or of his duties. His only duties were to ride and unload.

Paraphrasing the holding of *Ispass, supra,* since "none" of Petitioner's alleged "helping" activities come within the kind of "helpers' " activities which, according to the Commission, affect the safety of operation, Petitioner is accordingly entitled to the benefits of §7 of the FLSA.

Nor is Petitioner pulled back into the Commission's jurisdiction, so to speak, by his activities respecting "loading" or "directing driver backing into loading docks."

As to "loading," this was always "light load" and of the completely non-discretionary variety, involving no load placement nor any "shifting or adjusting the load" or the like. Further, it was limited to two or three instances in 11 or 12 months, all "return" goods (and none in interstate commerce), and it was not a part of Petitioner's duties. In these circumstances, there is evidence to support the fact finder's determination that the "loading" was not of the kind described by the Commission as affecting safety of operation, and, in any event, was so trivial, casual or occasional a part of Petitioner's activities (and no part of his duties) as to be "de minimis" rather than "a natural, integral and apparently inseparable [though infrequent] part" of his activities or duties. Accordingly, the "loading" does not bring Petitioner within the section 13(b)(1) exemption. In addition to *Pyramid*

Motor Corp. v. Ispass, supra, the following cases are plainly in point, viz: *Wirtz v. C & P Shoe Corporation, supra; Yellow Transit Freight Lines v. Balven, supra; Opelika Royal Crown Bottling Company v. Goldberg,* 299 F.2d 37 at 42, 42 (5th Cir. 1962).* Of course, Petitioner's activity in the plant, forming no part of his "swamper's" job, involved (so far as here concerned) merely putting freight on a conveyor belt, while others (to Petitioner's exclusion) took it off the belt and placed it in the trucks. This does not come within the Commission's jurisdiction. *Barrick v. South Chicago Coal & Dock Co.* (N.D. Ill., 1944), 8 Labor Cases par. 62, 242, aff'd, 149 F.2d 960 (7th Cir. 1945). Naturally, *un*loading is not safety affecting, see, e.g., *Walling v. Silver Fleet Motor Express,* 67 F. Supp. 846 (W.D. Ky. 1946), and the Commission has never so contended. With respect to loading, the Administrator's official interpretations sum it up well, as follows:

> "... the placing of certain articles of freight on a motor carrier truck may form so trivial, casual, or occasional a part of an employee's activities, or his activities may relate only to such articles or to such limited handling of them, that his activities will not come within the kind of 'loading' which is described by the Commission and which, in its opinion, directly affects 'safety of operation.' Thus, the following activities have been held to provide no basis for exemption: unloading; placing freight in convenient places in the terminal,

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*The *Opelika* case also involved "helpers" and held them (but not the loader) within section 13(b)(1) *because* they (unlike Petitioner) *did* do, on a "recurring" basis, work of the kind the Commission found, in respect to helpers, to directly affect safety of operations on the highway, e.g. "helping to direct the distribution trucks back onto crowded highways" (Id., 299 F.2d 37 at 43).

checking bills of lading; . . . loading vehicles for trips which will not involve transportation in interstate or foreign commerce within the meaning of the Motor Carrier Act; . . . the Commission expressly recognized that there is a class of freight which, because it is light in weight, probably could not be loaded in a manner which would adversely affect 'safety of operation.' In the case of coal trucks which are loaded from stock piles by the use of an electric bridge crane and a mechanical conveyor, it has been held that employees operating such a crane or conveyor in the loading process are not exempt as 'loaders' under section 13(b)(1). It seems apparent from the foregoing discussion that an employee who has no responsibility for the proper loading of a motor vehicle is not within the exemption as a 'loader' merely because he furnishes physical assistance when necessary in loading heavy pieces of freight, or because he deposits pieces of freight in the vehicle for someone else to distribute and secure in place, or even because he does the physical work of arranging pieces of freight in the vehicle where another employee tells him exactly what to do in each instance and he is given no share in the exercise of discretion as to the manner in which the loading is done. Such activities would not seem to constitute the kind of 'loading' which directly affects the safety of operation of the loaded vehicle on the public highways, under the Commission's definitions." (29 CFR §782.5(c), pp. 474, 475; footnotes omitted.)

With respect to Petitioner's "directing driver backing into loading docks," this (like the "loading") is not one of the activities of helpers mentioned by the Commission as being "safety affecting," nor it is similar or analogous to any of the activities so mentioned by the Commission in this regard (all of which relate

to safety in operating on the highway). Moreover, this was strictly a "casual thing," was not a part of Petitioner's duties, and occurred most infrequently. It was accordingly competent for the fact finder to determine that this was so trivial, casual or occasional as to be "de minimis," within the rule of *Ispass* and related cases, as opposed to being "a natural, integral and apparently inseparable [though infrequent] part" of Petitioner's duties or activities within the rule of *Morris. Further,* it is undisputed that the backing occurred in private yards, *not* on the highway, and did *not* in any way involve either getting onto or off the highway. It was thus not within the Commission's jurisdiction. The Commission itself has said its jurisdiction extends to "safety of operation of motor *vehicles on the highways* of the country, and *that alone." Ex parte No. MC-2, supra,* 28 MCC 125 at 129; emphasis added. As the Administrator has pointed out in his official interpretations, "highways" means "public highways" (29 CFR §782.2, p. 468) and "the exemption does not extend to employees merely because they engage in activities affecting the safety of operation of motor vehicles operated on private premises." (29 CFR §782.2, p. 470).

All, then, that is left is that Petitioner, in the regular course of his employment, rode with the driver on interstate trips for the purpose of performing non-safety affecting operations at destination. He did nothing else relevant or safety affecting, and it was not a part of his job to. His activities and duties did not in fact affect safety of operations. If this means that Petitioner is, *as a matter of law,* with the section 13(b)(1) exemption, then the decision of the Court of Civil Appeals is correct; otherwise it is not. Petitioner earnestly

submits that the decision below is not correct. It should be reversed, and this important and significant question of federal law, in an area where there is obviously some confusion and conflict and in which this Honorable Court has not written for some 20 years, should be determined by this Honorable Court.

CONCLUSION

For the foregoing reasons, Petitioner prays that a writ of certiorari issue to the Court of Civil Appeals For the Twelfth Supreme Judicial District of Texas, at Tyler.

Respectfully submitted,

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APPENDIX

OPINION OF THE COURT OF CIVIL APPEALS

(being the opinion below; reported at 406 S.W. 2d 256)

In the Court of Civil Appeals for the Twelfth Supreme Judicial District of Texas, At Tyler

No. 191

Texas Farm Products Company, *Appellant*

vs.

Aron Williams, *Appellee*

Appeal from the 145th Judicial District Court of Nacogdoches County, Texas

This suit was instituted by appellee, Aron Williams, against appellant, Texas Farm Products Company, in the District Court of Nacogdoches County, Texas, seeking under the Fair Labor Standards Act of 1938 (Title 29, Sec. 207, et seq.) certain sums allegedly due from appellant for overtime hours worked by appellee. In addition to the amount of overtime pay claimed, appellee sought a like amount as liquidated damages and attorney's fees as authorized by the Act. Appellant defended the action principally upon the grounds that the employee classification of appellee was such that he fell within the provisions of Sec. 213(b) (1) of said statute, which specifically exempted appellee from its overtime pay requirements.

The cause was submitted to a jury which found, in answer to special issues, that appellee, Aron Williams, during the periods of time here relevant, (1) had ridden across a state line in a truck owned by appellant, hauling the latter's property in the scope of his em-

ployment as a driver's helper; (2) that appellee made such trips across state lines regularly or repeatedly; (3) that appellee, as an employee for appellant, had performed work of loading appellant's goods and products onto a conveyor belt which carried such goods and products directly into appellant's truck or trailer for transportation across state lines; (4) that appellee, as such employee, performed such work regularly and repeatedly; (6) that appellant transports property repeatedly across state lines and that (7) appellee was required in his employment by appellant to cross state lines on a regular and re-occurring basis; (8) that appellee, as such employee, had engaged in the following activities for appellant: (a) directing a driver backing into loading docks and (h) loading trucks, but in effect the jury further found (9) that such activities did not substantially affect the safety of the operation of the vehicle. The jury also in effect found (10) that appellant had not acted in good faith in failing to pay appellee overtime pay and that (11) appellant did not have reasonable grounds for believing that its refusal to pay such overtime pay was not a violation of the Act and found that (12) the sum of $750.00 was a reasonable attorney's fees for legal services rendered in the case by appellee's attorney.

Shortly after appellee had rested his case, appellant presented its Motion for Instructed Verdict upon the grounds that, as a matter of law, the evidence conclusively showed that appellee was an "exempted" employee within the terms of Sec. 213(b) (1) of the Fair Labor Standards Act and that appellant had not violated it. Appellant's motion was overruled and, before judgment was entered upon the verdict, appellant, by its Motion for Judgment Non Obstante Veredicto,

moved the court to enter judgment for it upon substantially the same grounds it had urged in its Motion for Instructed Verdict. After due notice and a hearing thereon, the trial court overruled appellant's motion and entered judgment for appellee for the sum of $548.49, which sum was established as being the correct amount of overtime pay due if appellee was subject to the Act, a like amount as liquidated damages under Sec. 216, and the additional sum of attorney's fees as found by the jury. Appellant's Motion for New Trial having been overruled, this appeal has been timely perfected.

By its first Point of Error appellant contends that the trial court erred in refusing to hold that appellee was an "exempt" employee under Sec. 213(b) (1) of the Fair Labor Standards Act; and by its second Point of Error appellant asserts that the trial court erred in awarding to appellee liquidated damages because it was conclusively established that its refusal to pay overtime wages was in good faith and upon a reasonable belief that it was not in violation of the Act. In view of the disposition we make of the case, it will be unnecessary to discuss the second Point of Error.

The primary and, as we view it, the crucial point to be decided is whether appellee was an "exempt" employee under the Act thereby relieving appellant of the obligation to pay him the overtime rate as provided in Section 207 aforesaid.

In order to clearly understand appellant's contentions herein, it is deemed necessary to briefly review the statutes involved.

In 1935 the Motor Carrier Act (49 U.S.C.A., Sec. 301-327) was passed by Congress. The Congressional

intent in passage of this legislation was to promote the safety of interstate carriers and the Motor Carrier Act gave the Interstate Commerce Commission the power to establish reasonable regulations with respect to the qualifications and maximum hours of service of certain employees and safety of operations and equipment.[1]

In 1938 Congress passed the Fair Labor Standards Act, under which this suit is brought, and provided thereby for the rates of pay for employees doing overtime work as defined therein.[2]

Sec. 13(b) (1), 29 U.S.C.A., Sec. 213(b) (1) of the

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[1]Sec. 304 of the Motor Carrier Act reads in part as follows:

"(a) It shall be the duty of the Commission—

"(1) To regulate common carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

"(2) To regulate contract carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

"(3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment. * * *"

[2]"(a) (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed; * * *"

Fair Labor Standards Act created the exemption which forms the basis of appellant's defense herein. This Section specifically provided that the provisions of Sec. 207 of said Act did not apply with respect to:

> "(1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 304 of Title 49; * * * (Sec. 204 of the Motor Carrier Act, 1935)."

In 1941 the Interstate Commerce Commission, pursuant to the authority extended it under the Motor Carrier Act, promulgated an order in which it defined those classifications of employees of Interstate Motor Carriers, other than truck drivers, over which it had jurisdiction. Ex parte No. MC-2, *In the Matter of Maximum Hours of Service of Motor Carrier Employees*, 28 MCC 125 (1941). The Commission determined that drivers' "helpers," as defined by it, did affect the safety of operation of vehicles and therefore such drivers' "helpers" were within the Commission's jurisdiction and, accordingly, were excluded from the benefits of Section 207 of the Fair Labor Standards Act.[3]

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[3] "(4) *Helpers.*—The great majority of trucks are operated by a driver alone. Some carriers employ a driver and an assistant who drives part of the time and helps in loading and unloading. Both are drivers and subject to our jurisdiction. In certain sections of the country, however, carriers employ men known as helpers who ride on the vehicle, but do not drive. These helpers not only assist in loading and unloading the vehicle but perform many duties which aid in the safe operation of the motor vehicle. The helpers dismount when the vehicle approaches a railroad crossing, and flag the driver across the railroad tracks. They perform a similar duty when the motor vehicle is being turned around on a busy highway or when it is entering or emerging from a driveway. In the case of a break-down the helper places the flags, flares,

The Commission further in the Order aforesaid entered as a finding of fact and conclusion of law the following:

> "*Findings of fact.*—* * * 3. That helpers employed by common and contract carriers and private carriers of property by motor vehicle subject to part II of the Interstate Commerce Act devote a substantial part of their time to activities which directly affect the safety of operation of motor vehicles in interstate or foreign commerce. We further find that the term 'helpers' as used herein

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and fuses as required by our safety regulations. The presence of a helper in the case of a break-down or an accident makes it possible for one man to go for assistance without leaving the truck unprotected on the highway. Tire trouble is not as frequent as formerly, but punctures do occur. The helper is, of course, of great assistance to the driver in changing tires, putting on or removing chains, and making minor repairs. As the great majority of trucks are operated safely with only one man on the vehicle, we cannot say that the presence of a helper is required, nor do our safety regulations so provide. It is clear, however, that the duties performed by a helper aid materially in the safe operation of a motor vehicle, and that they devote substantially all of their time to such work. Ordinarily, no doubt, a helper will be on duty the same number of hours as a driver, and it seems entirely practical and logical that the hours of a helper should be regulated in the same manner as those of the driver. We conclude that helpers devote a substantial part of their time to activities which directly affect the safety of operation of motor vehicles operated in interstate or foreign commerce, and hence that we have power to establish qualifications and maximum hours of service for such employees under said section 204(a).

"* * *

"We believe that it is neither necessary nor practicable to draw fine distinctions between the work done by the various employees who ride on the motor vehicle in other capacities than that of driver. To some extent at least, they all engage in activities which directly affect safety of operation. An attempt to limit our jurisdiction over them in accordance with the degree in which they engage in such activities would create confusion and continual controversy. They will be included in the category of helpers."

includes all employees, other than the drivers, who are required to ride on a motor vehicle when it is being operated in interstate or foreign commerce.

"*Conclusions of law.*—* * * 3. That we have power, under section 204(a) of said part II (the Motor Carrier Act of 1935), to establish qualifications and maximum hours of service for the classes of employees covered by findings of fact numbered * * * 3 above, * * *"

Appellee contends that he was hired by appellant and worked as a "swamper;" that he was required to accompany the truck driver for the sole purpose of unloading the truck or trailer upon reaching its destination and that he was not required to perform any duties or activities which were of a "safety-affecting" nature and, therefore, the Interstate Commerce Commission acquired no jurisdiction under Section 213(b) (1) of the Act to establish qualifications and maximum hours of service for such an employee. He therefore asserts that he was not an "exempt" employee within the meaning of the Act. Moreover, appellee points out that the jury, in answer to Special Issue 8, Sections (b) through (g), failed to find that appellee, during his employment with appellant, had directed a driver pulling away from loading docks; or had directed a driver onto highways or at railroad intersections or had changed tires, set up flares, or fixed flats. Appellee contends therefore that it was within the province of the trier of the facts to determine whether appellee's activities "affected the safety of operation" and, unless there is a factual determination in the trial court that his activities did so affect the safety of operations, the appellee did not fall within the exemption provisions of Sec. 213(b) (1) of the Fair Labor Standards

Act. Appellant contends that the Interstate Commerce Commission has already determined that certain *classes of work* set forth in 28 MCC 125, such as "helpers," directly "affects the safety of operation" of motor vehicles in interstate commerce and it is necessary only to determine whether appellee's activities were such as to fall within the Commission's definition of "helpers." Appellant further contends that the admissions of appellee, together with the jury findings below, clearly placed him within the jurisdiction of the Interstate Commerce Commission, thereby making applicable the exemption provision of the Fair Labor Standards Act.

In an early case defining which employees were to be within the jurisdiction of the Interstate Commerce Commission under Section 204 of the Motor Carrier Act (49 U.S.C.A., Sec. 304(a)), the United States Supreme Court held that the provision was limited to those employees whose activities affected the safety of operation. The court held that the Interstate Commerce Commission had no jurisdiction to regulate the qualifications or hours of service of any others. United States v. American Trucking Association, 301 U.S. 534, 553, 84 L.Ed. 1345, 1356, 60 Sup. Ct. 1059 (1940). However, once it is determined that the Commission under Section 13(b) (1) of the Fair Labor Standards Act possesses the *power* to regulate certain employees, all such employees falling within such classification are exempt *regardless* of whether the Commission has exercised its power to regulate. If any employee falls within the Commission's jurisdiction, he is excluded per se from the benefits of the overtime provisions of Section 207 of the Act. Southland Gasoline Co. v. Bailey, 319 U.S. 44, 87 L.Ed. 1244, 63 Sup. Ct. 917. Sim-

ilar regulations and factual determinations of the Interstate Commerce Commission were upheld by the Supreme Court in Levinson v. Spector Motor Service, 330 U.S. 649, 91 L.Ed. 1158, 67 Sup. Ct. 931 (1947). The employees involved in the cited case were "checkers" or "terminal foremen," a substantial part of whose activities consisted of directing the work of "loaders" of freight for interstate motor carriers. In the cited case, the class of work of "loaders" had been defined by the Commission and it was conceded that at least a part of these employee's activities did not affect the safety of operation of motor carriers. The court held that the Commission had the power under Section 13(b) (1) of the Fair Labor Standards Act to classify such activities and that such employees therefore were excluded from the overtime pay provisions of the Act. The court points out that the Commission had found that it had the power to establish qualifications and maximum hours of service for those persons doing the work of "loaders" although the Commission had not found it advisable to establish qualifications and maximum hours of service for that work. The findings of fact of the Commission, the court found, were squarely within the jurisdiction of the Commission and, since the latter had the *power* to make regulations relating to such activities, such employees fell within the exemption provision of the Act. The determination by the Commission that the work of "loaders," *as defined by it,* affected the safety of motor carrier operation was squarely and directly upheld by the Supreme Court. The companion case of Pyramid Motor Freight Corporation v. Ispass, 330 U.S. 695, 698, 91 L.Ed. 1184, 67 Sup. Ct. 954, (1947), made it clear that it was within the province of the

District Court to determine whether the activities of the employee consisted, wholly or in substantial part, of the *class of work* of a "loader" as *defined* by the Interstate Commerce Commission. And in Morris v. McComb, 332 U.S. 422, 92 L.Ed. 44, 68 Sup. Ct. 131, (1947), the court held that it was the *character* of the activities of the employee and *not* the amount of time actually spent in those activities that determined whether such employees were under the jurisdiction of the Commission.

The cases above cited clearly demonstrate that the United States Supreme Court places exclusive reliance upon the determination of the Interstate Commerce Commission and its classification of those jobs which are of a "safety-affecting nature." The principles announced in the above cases have been followed in numerous other decisions, a few of which will be here noted.

Opelika Royal Crown Bottling Company v. Goldberg, 299 F.2d 37, (5th Cir., 1962) is a closely analogous case and involved driver-helpers who rode on beverage distributing trucks driven in interstate commerce. The court noted that the ICC had made an exhaustive report on the type of job which it felt affected the safety of operations of vehicles under its jurisdiction, citing MC-2, 28 MCC 125. The court stated that the ICC had determined it had authority and jurisdiction of "helpers"—employees other than the driver—who rode on vehicles under ICC jurisdiction. The court quoted from the Report of the Commission wherein the latter had stated that it was neither necessary nor practicable to draw fine distinctions between the work done by the various employees who ride on the motor vehicle in

other capacities than that of driver. The Commission stated that to some extent at least all engaged in activities which directly affect safety of operation. In holding that these employees fall within the jurisdiction of the ICC and thus were "exempt" employees under the Fair Labor Standards Act, the court states as follows:

> "We feel that this finding by the Commission is determinative, and we therefore conclude that the driver-helpers in this case are exempt from the overtime provisions of the Fair Labor Standards Act by Section 13(b) (1) of that Act."

See also Fletcher v. Grinnell Bros., 78 F.Supp. 339 (1948); Mitchell v. Overnite Transportation Co., 176 F.Supp. 399 (1959); and Brooks Transportation Co., Inc., et al. v. United States, 93 F.Supp. 517 (1950).

The findings and conclusions of the Commission relating to "loaders" were sustained also in Mitchell v. Hill & Hill Truck Line, Inc., 183 F.Supp. 463, (Tex. 1960). It is interesting to note that the court in the last cited case holds that if the employees involved fall within the *Commission's definition* of "loaders," they are exempt under the relevant provisions of the Fair Labor Standards Act. The court states that it is the function of the trial court to determine whether the employees there involved seeking recovery of overtime compensation are engaged in activities coming within the Commission's definition of the work of a "loader."

It is our view in the case at bar that, unless the matter was established as a matter of law, it was the function of the trier of the facts to determine whether appellee's activities fell within the Commission's definition of "helpers" and, if appellee's activities did so

fall, he clearly would be an "exempt" employee under Section 213(b) (1) of the Fair Labor Standards Act aforesaid. The appellee's activities as found by the jury were within the Commission's definition of "helper."

The parties stipulated in the trial below that at all relevant times appellant produced goods for commerce and engaged in commerce within the meaning of the Fair Labor Standards Act of 1938, as amended. Further, the parties agreed that appellant produced either by manufacturing or jobbing, goods which regularly and frequently were shipped in interstate commerce, such goods consisting of feed, fertilizer and associated products. It was further agreed that at all relevant times appellee was an employee of appellant. Upon evidence, the sufficiency of which has not been questioned here, the jury has found in answer to Special Issues 1, 2, 7 and sub-sections (a) and (h) of Special Issue No. 8, that the activities of the appellee were such that he fell within the classification of "helper" as defined by the Commission. Therefore, since the "safety-affecting" nature of a "helper" has been determined by a proper Order of the Interstate Commerce Commission, the trial court is not authorized to upset that determination. The appellee therefore, under the record in this case, falls clearly within the provisions of Section 213(b) (1) of the Fair Labor Standards Act, and appellant was not obligated to pay the overtime sums for which suit was brought. The trial court erred in so holding and the judgment of the court below is reversed and is here rendered for the appellant.

July 21, 1966
Filed July 21, 1966

STATUTES AND REGULATIONS

Section 16(b), Fair Labor Standards Act of 1938, as amended, 52 Stat. 1069 (1938), as amended, 29 U.S.C. sec. 216(b) (1964) (Relevant portion).

§ 216.

. . .

(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves . . . The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. . . .

Section 11, Portal-to-Portal Act of 1947 29 U.S.C. Section 260 (1964), 61 Stat. 89 (1947).

§ 260. Liquidated damages

In any action commenced prior to or on or after May 14, 1947 to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if

the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216(b) of this title. May 14, 1947, c. 52, § 11, 61 Stat. 89.

Ex Parte No. MC-2[1]
(Relevant Portion)

IN THE MATTER OF MAXIMUM HOURS OF SERVICE OF MOTOR CARRIER EMPLOYEES

Submitted January 30, 1941. Decided March 4, 1941

Report of the Commission

By the Commission:

The sole question presented for our decision at this time is the determination of which employees of common or contract carriers and private carriers of property by motor vehicle, if any, other than drivers, perform duties which affect the safety of operation and are therefore subject to the authority conferred on us by section 204 (a) (1), (2), and (3) of part II (formerly cited as the Motor Carrier Act, 1935) of the Interstate Commerce Act to prescribe qualifications and maximum hours of service. The importance of this question is emphasized by the fact that section 13 (b) (1) of the Fair Labor Standards Act exempts from.

[1]This report also embraces Ex Parte No. MC-3, In the Matter of Need for Establishing Reasonable Requirements to Promote Safety of Operation of Motor Vehicles used in Transporting Property by Private Carriers.

the overtime provisions of section 7 thereof any employee with respect to whom we have power to establish qualifications and maximum hours of service pursuant to the provisions of said section 204. Before the Wage and Hour Division of the Department of Labor, which administers the provisions of the Fair Labor Standards Act, or the common, contract, and private carriers can well determine which employees are subject to the provisions of section 7 of that act, they must know the extent of our jurisdiction.

. . .

PRIOR PROCEEDINGS

The Fair Labor Standards Act was approved June 25, 1938. Shortly thereafter, we realized the necessity of determining the extent of our authority under section 204 (a), and on our own motion we instituted a proceeding known as Ex Parte No. MC-28 for that purpose. . . .

. . .

On May 9, 1939, we issued our report, *Jurisdiction over Employees of Motor Carriers,* 13 M. C. C. 481, and expressed our opinion as to the extent of our authority. Dealing first with private carriers of property, we said, page 482:

> We shall first dispose of the limited question of the extent of our power to prescribe qualifications and maximum hours of service for employees of private carriers of property, using the word "power" herein in view of the fact that it is the word used in the exemption contained in section 13 (b) of the Fair Labor Standards Act quoted above. Because of the precise wording of section 204 (a) (3) we have no doubt that our power under that

section is limited to prescribing qualifications and maximum hours of service for those employees only whose activities affect the safety of operation *of motor vehicles engaged in transporting property in interstate and foreign commerce.* [Emphasis supplied.]

Later in our report, on page 488, we stated our conclusions concerning employees of common and contract carriers as follows:

> For the reasons stated we conclude that our power under section 204 (a) (1) and (2) is limited to prescribing qualifications and maximum hours of service for those employees of common and contract carriers whose activities affect the safety of operation *of motor vehicles engaged in transporting passengers and property in interstate and foreign commerce,* and for the purpose of promoting such safety of operation. That power undoubtedly extends to drivers of such vehicles. It may well be that the activities of some employees other than drivers likewise affect the safety of operation *of motor vehicles engaged in interstate and foreign commerce.* If common and contract carriers, or private carriers of property, or their employees believe that the activities of employees other than drivers affect the safety of operation of motor vehicles engaged in interstate and foreign commerce, they may file an appropriate petition, asking that a hearing be held and the question determined. [Emphasis supplied.]

Shortly after the issuance of our report, the American Trucking Associations, Inc., and certain common and contract carriers instituted a proceeding in the United States Court for the District of Columbia seeking a mandatory injunction to compel us to assume jurisdiction over all employees of common and con-

tract carriers. The case was heard before a three-judge statutory court, and on December 4, 1939, that court rendered its decision, 31 Fed. Supp. 35. In that decision the court disagreed with the views expressed by us and held that we have jurisdiction to prescribe qualifications and maximum hours of service for all employees of common and contract carriers. After the issuance of the mandate, an appeal was taken by the United States to the Supreme Court of the United States. The Court rendered its decision on May 27, 1940, *United States v. American Trucking Assns., Inc.*, 310 U. S. 534, reversing the decision of the lower court and approving our interpretation of the statute. After a careful review of the legislative history of the act, the Court, at page 553, concluded as follows:

> Our conclusion, in view of the circumstances set out in this opinion, is that the meaning of employees in section 204 (a) (1) and (2) is limited to those employees whose activities affect the safety of operation. The Commission has no juricdiction to regulate the qualifications or hours of service of any others.

Shortly thereafter, the American Trucking Associations, Inc., on behalf of common, contract, and private carriers, filed a petition asking us to determine which employees, if any, other than drivers, are subject to our jurisdiction. We reopened the above-entitled proceedings for a determination of that question and referred the matter to an examiner for hearing. The hearing was held, the examiner issued his proposed report, exceptions were filed thereto, and we heard oral argument on January 30, 1941.

INTERPRETATION OF THE STATUTE

Before we can determine which employees engage in

activities which affect "safety of operation," we must determine the meaning of that phrase as used in the statute. Counsel for common and contract carriers contend that the words "safety of operation" should not be limited by the phrase "of motor vehicles," but on the contrary it is sufficiently broad to cover all of the activities of the carriers. They contend, for example, that we have authority to prescribe qualifications and maximum hours of service for employees engaged in operating freight and passenger elevators in the carriers' terminals or in moving freight and baggage by hand trucks or power trucks therein, and for other employees whose activities have no connection whatsoever with the actual operation of motor vehicles.

It is undoubtedly true, as contended, that the words "safety" and "operation" have been given broad interpretations in other statutes. We are not here concerned with the meaning of those words as used in other statutes, but merely with their meaning as used in section 204 (a) of part II. The Supreme Court in its decision in *United States v. American Trucking Assns., Inc., supra,* said, page 542:

> In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress. There is no invariable rule for the discovery of that intention. To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute, particularly in a law drawn to meet many needs of a major occupation.

We follow that rule in our interpretation of the phrase "safety of operation."

A careful review of the legislative history of the enactment of this section discloses a clear intent of Congress that we should regulate the safety of operation of motor vehicles on the highways of the country, and that alone. This legislative history has been fully reviewed by the Supreme Court and by us in prior decisions, and no useful purpose would be served by going over this ground again. It is sufficient to say that no testimony was submitted before the committees of Congress which related to safety that was not confined solely to the safety of operation of motor vehicles. There is no word in the committees' reports or in the debates of Congress on the subject of safety which relates to anything but safety of operation of motor vehicles. We therefore interpret the phrase "safety of operation" as meaning the safety of operation of motor vehicles.

This is not the first occasion on which we have expressed this view. In *Jurisdiction over Employees of Motor Carriers, supra,* and particularly in the two paragraphs quoted above, we used the phrase "safety of operation" three times, and we followed it with the words "of motor vehicles engaged in interstate and foreign commerce." As far back, therefore, as our decision on this subject in May 1939, we expressed clearly our understanding that the term "safety of operation" meant safety of operation of motor vehicles engaged in interstate and foreign commerce. The Supreme Court had this decision before it and referred to it in the decision in the case of *United States v. American Trucking Assns., Inc., supra.* The Court was therefore aware of our opinion that the term safety of operation meant safety of operation of motor vehicles and tacitly approved of that interpretation.

This conclusion reached, it is necessary to determine whether employees whose duties indirectly affect safety of operation of motor vehicles and who devote very little time to the performance of such duties are subject to our jurisdiction. Representatives of the carriers at the hearing contended that a stenographer who writes a letter relating to safety or prepares an accident report, and a file clerk who has charge of filing accident reports, records showing the hours of service of drivers, inspection reports, and other similar documents, perform duties which affect safety of operation. These contentions were advanced despite the fact that many of these clerical employees spend only an average of a few minutes a day in such work. The carriers further contend that employees engaged in the preparation of schedules, billing clerks, and indeed almost their entire clerical forces perform duties which affect safety of operation.

These claims are too broad. The Supreme Court in *United States v. American Trucking Assns., Inc., supra,* made it entirely clear that we have no jurisdiction over employees whose activities do not affect safety of operation. To find that an employee, who devotes a few minutes a day to clerical work which indirectly affects safety, is subject to our jurisdiction would nullify the principal ruling of the Court.

We are charged with the administration of the Hours of Service Act, as amended (45 U. S. C. 61-64). Under section 2 of that act, it is unlawful for employees actually engaged in or connected with the movement of any railroad train operated in interstate commerce to be on duty for more than 16 consecutive hours. The proviso to that section, however, makes it unlawful for

an operator, train dispatcher, or other employee who, by the use of the telegraph or telephone, dispatches trains, to be on duty for more than 9 hours in any period of 24 hours. In the early days of our administration of that act, our attention was directed to several instances where employees, other than dispatchers, occasionally used the telephone and, as a result of information received, issued orders to the engineers. Enforcement proceedings were instituted by the United States claiming that this incidental use of the telephone subjected the employees to the 9-hour-maximum provision. This situation was presented to the Circuit Court of Appeals for the Fifth Circuit in the case of *United States v. Florida East Coast Ry. Co.*, 222 Fed. 33, and, in its opinion, the court said, page 36:

> It seems to us that it would plainly violate accepted canons for construing statutes to include in the proviso a train conductor, having no fixed place for work except on a moving train, and who, under the first clause of section 2 may be required or permitted to work for the period of 16 hours. *His primary and chief duty* requires him to look after his train, and stopping at a station to transmit or receive an order, affecting his immediate train, *is a mere incidental service,* which cannot operate to classify him as a telegraph or telephone operator or train dispatcher. The contention of counsel for the government is that train conductors are included in the words of the proviso, "or other employe," who by the use of the telegraph or telephone dispatches reports, etc. We have endeavored to show that it was not the intention of the lawmakers to so include them. [Emphasis supplied.]
>
> . . .

There are other decisions of similar import, and, as

a result of our study of them and of the Supreme Court's decision in *United States v. American Trucking Assns., Inc., supra,* we have concluded that we should not assert jurisdiction as to employees who spend an unsubstantial part of their time in performing duties which affect the safety of operation of motor vehicles. We therefore conclude that under said section 204 (a) we have power to establish qualifications and maximum hours of service with respect only to employees who devote a substantial part of their time to activities which directly affect safety of operation. Our task is thus narrowed to determining which employees of common and contract carriers and of private carriers of property by motor vehicle, engaged in interstate or foreign commerce, fall within that category.

THE EVIDENCE

The record in this proceeding discloses that the employees engaged in preparing the motor vehicles for operation on the highways and in the actual operation thereof fall into five principal classes, as follows: (1) Mechanics and other garage workers; (2) loaders; (3) dispatchers; (4) drivers; and (5) helpers. As we have previously held in *Maximum Hours of Service of Motor Carrier Employees,* 11 M. C. C. 203, and in *Motor Carrier Safety Regulations—Private Carriers,* 23 M. C. C. 1, that drivers of motor vehicles engaged in transporting passengers or property in interstate or foreign commerce are subject to our jurisdiction, we shall not discuss their duties in this report. The duties of the other employees will be discussed in the order given.

. . .

(2) *Loaders.*—The practice of small carriers in re-

gard to the employment of loaders differs from that of the large carriers. The drivers employed by the small carriers load and unload the motor vehicles. This situation presents no problem for decision here, because as these men are drivers, we have, in our prior decisions, found them subject to our jurisdiction.

The large carriers, however, and particularly those who have important operations from terminal to terminal, employ men variously called loaders, dockmen, or helpers, and hereinafter called loaders, whose sole duties are to load and unload motor vehicles and transfer freight between motor vehicles and between the vehicles and the warehouse.

The evidence makes it entirely clear that a motor vehicle must be properly loaded to be safely operated on the highways of the country. If more weight is placed on one side of the vehicle than on the other, there is a tendency to tip when rounding curves. If more weight is placed in the rear of the vehicle, the tendency is to raise the front wheels and make safe operation difficult. Further, it is necessary that the load be distributed properly over the axles of the motor vehicle.

Proper loading is not only necessary when heavy machinery, steel, and other like commodities are being transported, but is of importance when normal package freight is handled. If several packing cases weighing from 150 to 200 pounds are loaded on one side of a motor vehicle or at one end thereof, and lighter freight on the other side or at the other end, safe operation is difficult. The great majority, if not all, of the carriers whose operations are of sufficient size or character to justify the employment of loaders handle

freight of such weight that proper loading is necessary. Evidence concerning the necessity for proper loading was submitted not only by the carriers but by representatives of the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, the union to which organized loaders belong. There was no conflicting evidence on this point. We conclude that loaders devote a large part of their time to activities which directly affect the safety of operation of motor vehicles operated in interstate or foreign commerce, and hence that we have power to establish qualifications and maximum hours of service for such employees under said section 204 (a).

We are, of course, aware of the fact that certain carriers and particularly private carriers are engaged solely in the transportation of freight which, because it is light in weight, probably could not be loaded in a manner which would adversely affect safety of operation. Our study of the subject indicates, however, that carriers engaged solely in the transportation of such commodities do not generally employ loaders but on the contrary the drivers load and unload the vehicles.

We are, likewise, aware of the fact that poor loading is the cause of relatively few highway accidents. This is also true of the work done by mechanics, but, as indicated in our discussion of the work so done, we do not regard this as determinative.

. . .

(4) *Helpers.*—The great majority of trucks are operated by a driver alone. Some carriers employ a driver and an assistant who drives part of the time and helps in loading and unloading. Both are drivers and subject to our jurisdiction. In certain sections of the country,

however, carriers employ men known as helpers who ride on the vehicle, but do not drive. These helpers not only assist in loading and unloading the vehicle but perform many duties which aid in the safe operation of the motor vehicle. The helpers dismount when the vehicle approaches a railroad crossing and flag the driver across the railroad tracks. They perform a similar duty when the motor vehicle is being turned around on a busy highway or when it is entering or emerging from a driveway. In the case of a break-down the helper places the flags, flares, and fusees as required by our safety regulations. The presence of a helper in the case of a break-down or an accident makes it possible for one man to go for assistance without leaving the truck unprotected on the highway. Tire trouble is not as frequent as formerly, but punctures do occur. The helper is, of course, of great assistance to the driver in changing tires, putting on or removing chains, and making minor repairs. As the great majority of trucks are operated safely with only one man on the vehicle, we cannot say that the presence of a helper is required, nor do our safety regulations so provide. It is clear, however, that the duties performed by a helper aid materially in the safe operation of a motor vehicle, and that they devote substantially all of their time to such work. Ordinarily, no doubt, a helper will be on duty the same number of hours as a driver, and it seems entirely practical and logical that the hours of a helper should be regulated in the same manner as those of the driver. We conclude that helpers devote a substantia part of their time to activities which directly affect the safety of operation of motor vehicles operated in interstate or foreign commerce, and hence that we have power to establish qualifications and max-

imum hours of service for such employees under said section 204 (a).

A limited number of carriers are engaged in the specialized business of transporting money, securities, and valuables, and for this purpose use armored trucks. These trucks are manned not only by the driver but by armed guards. An armed guard generally sits with the driver while another may be within the locked compartment of the truck with the cargo. The primary duty of these armed guards is to protect the valuables in the case of attempted robberies. It appears, however, that in the case of an accident or other emergency, and in other respects, the armed guards act in a capacity somewhat similar to that of the helpers described above.

One large passenger carrier operating between Seattle, Wash., and Butte, Mont., employs 25 young women called conductorettes. The primary duties of these employees are to see to the comfort of the passengers. However, in instances where accidents occur, they help the driver in obtaining aid and protect the vehicle from oncoming traffic.

We believe that it is neither necessary nor practicable to draw fine distinctions between the work done by the various employees who ride on the motor vehicle in other capacities than that of driver. To some extent at least they all engage in activities which directly affect safety of operation. An attempt to limit our jurisdiction over them in accordance with the degree in which they engage in such activities would create confusion and continual controversy. They will be included in the category of helpers.

We have not heretofore made specific reference to

carriers engaged in the transportation of passengers except insofar as the employment of conductorettes is concerned. All that we have said concerning the work done by employees of carriers of property applies, of course, with equal force to similar employees of passenger carriers. The findings herein made cover employees of both passenger and property carriers.

. . .

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Our findings of fact and conclusions of law are as follows:

Findings of fact.— . . .

2. That loaders, as above defined, employed by common and contract carriers and private carriers of property by motor vehicle subject to Part II of the Interstate Commerce Act devote a large part of their time to activities which directly affect the safety of operation of motor vehicles in interstate or foreign commerce.

3. That helpers employed by common and contract carriers and private carriers of property by motor vehicle subject to part II of the Interstate Commerce Act devote a substantial part of their time to activities which directly affect the safety of operation of motor vehicles in interstate or foreign commerce. We further find that the term "helpers" as used herein includes all employees, other than the drivers, who are required to ride on a motor vehicle when it is being operated in interstate or foreign commerce.

4. That no employees of common and contract carriers or private carriers of property by motor vehicle, subject to part II of the Interstate Commerce Act, oth-

er than drivers and those classes of employees covered by the three preceding findings of fact, perform duties which directly affect safety of operation.

Conclusions of law.—1. That the term "safety of operation," as used in section 204 (a) of part II of the Interstate Commerce Act, means the safety of operation of motor vehicles in the transportation of passengers or property in interstate or foreign commerce, and that alone.

2. That our jurisdiction to prescribe qualifications and maximum hours of service for employees of common and contract carriers and private carriers of property by motor vehicle is limited to those employees who devote a substantial part of their time to activities which directly affect the safety of operation of motor vehicles in the transportation of passengers or property in interstate or foreign commerce.

3. That we have power, under section 204 (a) of said part II, to establish qualifications and maximum hours of service for the classes of employees covered by findings of fact numbered 1, 2, and 3 above, and that we have no such power over any other classes of employees, except drivers.

A further hearing will be held to determine what regulations, if any, should be prescribed for those employees, other than drivers, whom we have found subject to our jurisdiction. No order is necessary at this time.

TEXAS RULES OF CIVIL PROCEDURE

Relevant Portions of Rules 279, 428, 481, 483 and 515

RULE 279. SUBMISSION OF ISSUES [District and County Courts]

. . . Failure to submit an issue shall not be deemed a ground for reversal of the judgment, unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment; provided, however, that objection to such failure shall suffice in such respect if the issue is one relied upon by the opposing party. Failure to submit a definition or explanatory instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or explanatory instruction has been requested in writing and tendered by the party complaining of the judgment.

Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and upon which no issue is given or requested shall be deemed as waived; but where such ground of recovery or of defense consists of more than one issue, if one or more of the issues necessary to sustain such ground of recovery or of defense, and necessarily referable thereto, are submitted to and answered by the jury, and one or more of such issues are ommited, without such request, or objection, and there is evidence to support a finding thereon, the trial court, at the request of either party, may after notice and hearing and at any time before the judgment is rendered, make and file written findings on such omitted issue or issues in support of the judgment, but if no such written findings are made, such omitted issue or issues shall be deemed as found by the court in such manner as to support the judgment. A claim that the evidence was insufficient to warrant the submission of any issue may be made for the first time after verdict, regardless of whether the submission of such issue was requested by the complaining party.

RULE 428. Amendment: Record [Courts of Civil Appeals]

If anything material to either party is omitted from the transcript or statement of facts, the parties by stipulation, or the trial court, either before or after the record has been transmitted to the appellate court, or the appellate court, on a proper suggestion or on its own initiative, may direct a supplemental record to be certified and transmitted by the clerk of the trial court supplying such omitted matter.

RULE 481. AMENDMENT OF APPLICATION AND BRIEFS [Supreme Court]

The application, or brief or the argument in support thereof, or in reply thereto, may be amended at any time when justice requires upon such reasonable terms as the court may prescribe. The record and appeal bond may be amended in the Supreme Court under the same circumstances and on the same terms as in the Court of Civil Appeals under Rules 428, 429, 430 and 431.

RULE 483. ORDER ON APPLICATION FOR WRIT OF ERROR [Supreme Court]

In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court will refuse the application with the docket notation "Refused." In all cases where the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error which requires reversal, the Court will deny the application, with the notation "Refused. No Reversible Error." In all cases

where the Supreme Court is without jurisdiction of the case as presented in the application it will dismiss the application with the docket notation, "Dismissed for Want of Jurisdiction."

. . .

RULE 515. MOTION FOR REHEARING [Supreme Court]

A motion for rehearing may be filed with the clerk of the court within fifteen days after the date of rendition of the judgment or decision of the court or the order refusing or dismissing an application for writ of error, whether such date be in the same or a succeeding term of such court. . . .

ORDERS BELOW

IN THE COURT OF CIVIL APPEALS
TWELFTH SUPREME JUDICIAL DISTRICT

Texas Farm Products Company) From Nacogdoches
No. 191 vs.) County
Aron Williams)

July 21, 1966

JUDGMENT

THIS CAUSE came on to be heard on the transcript of the record; and the same being inspected, it is the opinion of the court that there was error in the judgment as entered by the trial court and that the same should be reversed and rendered.

It is therefore ORDERED, ADJUDGED and DECREED by the Court that the judgment of the trial court in favor of Aron Williams be and the same is hereby reversed and judgment is here rendered for the appellant, Texas Farm Products Company, and that all costs in this behalf expended, both in this court and the court below be and the same are adjudged against the appellee, Aron Williams.

It is further ORDERED by the Court that the officers of this court and the court below recover of the appellant, Texas Farm Products Company, and from M. Steele Wright, Jr. and Thomas W. Wright, sureties on appellant's supersedeas bond, all costs incurred by said appellant upon this appeal for all of which execution may issue, and that this decision be certified to the court below for observance.

Recorded in Minute Book 1, Page 191 of the MINUTES of said Court.

September 22, 1966

ORDER

Motion Docket No. 536:

Appellee's Motion for Rehearing having been duly considered, it is ORDERED that said Motion be, and hereby is, overruled.

Recorded in Minute Book 1, Page 195 of the MINUTES of said Court.

IN THE SUPREME COURT OF TEXAS

No. A-11,747 January 4, 1957

Aron Williams) From Nacogdoches
vs.) County,
Texas Farm Products Company) Twelfth District.

Application of petitioner for writ of error to the Court of Civil Appeals for the Twelfth Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant, Aron Williams, pay all costs incurred on this application.

No. A-11,747 February 1, 1967

Aron Williams) From Nacogdoches
vs.) County,
Texas Farm Products Company) Twelfth District.

Petitioner's motion for rehearing of application for

writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and the seal of the Supreme Court of Texas, at the City of Austin, this, the 1st day of February, 1967.

GARSON R. JACKSON, CLERK
By /s/ Jewell Seeliger, Deputy.
Mrs. Jewell Seeliger

(Seal)